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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 470

JOHN CLAY,
Petitioner,

vs.

SUN INSURANCE OFFICE, LIMITED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER AFTER GRANTING OF WRIT OF CERTIORARI

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OPINIONS OF THE COURT BELOW

The first opinion of the United States Court of Appeals for the 5th Circuit (R. 26-34) is reported in 265 F.2d 522.

Petition for rehearing filed May 12, 1959 (R. 36-37), and petition of State of Florida as amicus curiae for rehearing filed May 12, 1959 (R. 37-39), was denied by "Minute

entry of order denying petitions for rehearing May 28, 1959." (R. 39).

The opinion of the Supreme Court of Florida in reply to questions certified to the Supreme Court of Florida by the United States District Court for the Southern District of Florida is reported in 133 So.2d 735 (R. 44-55).

The second opinion of the United States Court of Appeals for the 5th Circuit, following the response by the Supreme Court of the State of Florida to questions propounded (R. 56-66) is reported in 319 F.2d 505.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1), and order allowing certiorari dated December 2, 1963.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in the case are as follows:

1. The due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

2. Article I, Section 10, of the Constitution of the United States which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

3. Article IV, Section 1, of the Constitution of the United States which provides as follows:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *."

The Statute involved in this case is Section 95.03, Florida Statutes 1963, which provides as follows:

"Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Alabama Code 1896, Paragraph 2802. "Any agreement or stipulation verbal or written, whereby the time for the bringing of any action is limited to a time less than that prescribed by law for the bringing of such action is void."

QUESTION PRESENTED FOR REVIEW

"Should a federal court sitting in Florida recognize a 'suit clause' contained in a personal property insurance policy issued in Illinois but under which loss occurred in Florida, the insured at the time of the loss being a resident of the State of Florida? All of the property for which the claim was made having been located in the State of Florida and the insurer being admitted to do business in Florida?"

STATEMENT OF THE CASE

A complaint was filed by the petitioner John Clay against the respondent Sun Insurance Office, Limited, on May 20, 1957, in the United States District Court for the southern district of Florida, Miami division, seeking to recover $13,500.00 claimed in damages for loss of personal property under a personal property floater policy issued to the petitioner by the respondent on April 22, 1952 (R. 1-2). Attached to the complaint is a copy of the insurance policy (R. 3-8). The jurisdiction of the District Court was invoked because of the diversity of citizenship of the parties to the suit and the fact that the amount in controversy exceeded, exclusive of interest and cost, the sum of $3,000. Service was had upon the respondent and answer to the complaint was filed June 12, 1957 (R. 9-10). In the answer, by way of affirmative defense, the respondent raised the question of the suit clause contained in the policy (R. 10). The suit was tried before a jury in West Palm Beach, Florida, on June 4, 1958, and a verdict was entered in favor of the petitioner in the sum of $6,000 (R. 11), and final judgment was filed June 4, 1958, in accordance with the verdict of the jury (R. 11). On June 12, 1958, the respondent filed a "Motion for Judgment non obstante veredicto or in the alternative for a new trial" (R. 12-13). Paragraph 7 of the motion dealt with the question presented in this petition (R. 12). The matter was heard by the United States District Court on July 15, 1958, and an order denying the motion and setting a supersedeas bond was entered on the same date (R. 13). Notice of appeal was then filed on August 8, 1958 (R. 14). Thereafter, briefs were filed by the appellant and the appellee in the lower court and the matter was argued before the United States Court of Appeals sitting in Jacksonville,

Florida, on March 11, 1959. On April 8, 1959, the United States Court of Appeals for the 5th Circuit rendered its opinion reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 26-34). Judgment was entered by the United States Court of Appeals on April 8, 1959 (R. 35). On April 23, 1959, an extension of twenty days was granted for the filing of a motion for rehearing on the part of the plaintiff, John Clay, and the State of Florida as amicus curiae. On May 12, 1959, a petition for rehearing was filed by Clay, the plaintiff (R. 36-37), and by the Attorney General of the State of Florida as amicus curiae (R. 37-39). No opinion was rendered on the order denying rehearing but the Minutes of the Court reveal that the order was denied on May 28, 1959, with Circuit Judge Rives dissenting (R. 39). In the original opinion of the United States Court of Appeals (R. 26-34) and in the order denying rehearing one of the Judges dissented from the majority opinion and considered it advisable to state his personal views.

Following the denial of a rehearing, on the 26th day of August, 1959, petition for writ of certiorari was filed with the Clerk of the Supreme Court of the United States and given the docket No. 349, October Term, 1959. On October 26, 1959, the Honorable Court granted the petition for writ of certiorari and transferred the case to the summary calendar (R. 40). Following the granting of the petition for writ of certiorari, the Attorney General of the State of Florida requested permission to file briefs as amicus curiae on behalf of the State of Florida. The petition of the Attorney General was granted. Various briefs were filed on behalf of the petitioner and the Honorable Court heard oral argument by the attorneys for the petitioner, the respondent, and the Attorney General of the State of Florida as amicus curiae on the 22nd day of March,

1960. Subsequent to the oral argument the Court reversed and remanded the decision of the United States Court of Appeals (*Clay* v. *Sun Insurance Office, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170) with instructions to the Court of Appeals that it certify two questions concerning the case to the Supreme Court of Florida, and in pursuance to the mandate of the Supreme Court the Circuit Court propounded to the Florida Supreme Court the following questions (R. 42-43):

"(1) Are the provisions of Sections 95.03 and 95.11(3), Florida Statutes, making void any provisions of an insurance contract requiring suit on the contract to be filed in a period shorter than five years applicable to a personal property, world-wide, all risks, floater insurance policy under the following circumstances: the policy was applied for in Illinois from a British company, qualified to do business in Illinois and in Florida and nine other states, by the assured, who was then a resident of Illinois; the premium was paid in Illinois and the policy was issued there in 1952; subsequently, the assured moved his legal residence to Florida and the losses occurred there in 1954-55; suit was filed in Florida more than twelve months after discovery of the loss; the policy provided that any suit under the contract must be filed within twelve months from the discovery of the loss; the twelve-month limitation clause of the contract is valid and enforceable in the State of Illinois?"

"(2) Does an all-risks policy of insurance containing the following provision, 'The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this Policy caused by theft or attempt thereat; or by vandalism or malicious mischief to the interior of the residences of the Assured,' and containing numerous limitations, exceptions and exclusions but none touching on acts of a spouse of an assured, cover losses

from acts of vandalism and from theft committed by the wife of the assured, hostile to him and without his consent, when the property damaged and taken was in the common residence of the assured and his wife?"

The Florida Supreme Court amended its Appellate Rules by adopting a rule relating to "Certified Questions from Federal Courts" (*Sun Insurance Office, Limited,* v. *Clay,* Fla., 133 So.2d 735).

Thereafter, the Florida Supreme Court handed down its Opinion on October 18, 1961 (R. 44-55) and answered the propounded questions in the affirmative.

Thereafter, the United States Court of Appeals for the 5th Circuit advised the attorneys for appellant and appellee that it would receive briefs if counsel desired to file briefs. Briefs were filed by the attorney for appellant and attorney for appellee. On October 2, 1962, the case was argued before the United States Court of Appeals for the 5th Circuit in Jacksonville, Florida. On June 19, 1963, the United States Court of Appeals for the 5th Circuit rendered its opinion (R. 56-66), again reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 66).

Following the rendering of the Opinion of June 19, 1963, by the United States Court of Appeals for the 5th Circuit (R. 56-66) a petition for certiorari to the United States Court of Appeals for the 5th Circuit was filed in this court and on December 2, 1963, the honorable court allowed the certiorari, placed the case on the summary calendar as Case No. 470, October Term 1963 (R. 67).

STATEMENT OF FACTS

John Clay, the appellee, purchased the insurance policy under which the claim was made (R. 3-8) through the appellant's agent, Bartholomay & Clarkson of Chicago on April 22, 1952, being then a resident of the State of Illinois (R. 15). In July, 1952, after the purchase of the policy, the appellee moved to Florida and in July or August, purchased real estate known as J-C Ranch (R. 16, R. 21). At the time of his removal to Florida in 1952, he became a resident and citizen and has been continuously since July, 1952, a resident and citizen of Florida (R. 16, R. 17-18). In 1954 he took up residence at the J-C Ranch near Lake Harbor, Florida (R. 18). While residing at J-C Ranch near Lake Harbor, Florida, personal property which belonged to the appellee was stolen (R. 15-16). Some was burned (R. 18), and other property suffered from vandalism (R. 18). Property claimed to have been stolen was removed from the home by appellee's wife (R. 19), and although demand for the return of the articles was made, they were never returned. The appellee was never advised as to where they were and they were never again in his possession nor did he know where they were located at the time of the trial of the case (R. 19). The appellee's clothes were burned (R. 16-18) and a valuable family portrait was deliberately slashed by the appellee's wife (R. 18).

The appellee notified the appellant of the various losses on February 1, 1955 (R. 20). The appellant investigated the claim under reservation of rights and denied liability to the appellee on April 6, 1955 (R. 20). Suit on the policy was filed on May 20, 1957 (R. 1).

ARGUMENT

The case at bar appears in this court for the second time in a peripatetic history that has brought it from the United States District Court for the Southern District of Florida, to the United States District Court of Appeals for the 5th Circuit, to the United States Supreme Court, back to the United States District Court of Appeals for the 5th Circuit for certification of questions of law, to the Supreme Court of Florida, back to the United States District Court of Appeals for the 5th Circuit after the questions propounded had been answered in the affirmative by the Florida Supreme Court, and now back to this court on a second writ of certiorari. The expensive journey has taken more than six years. At the instant stage all issues of law and fact have been thoroughly litigated, with the exception of the resolution of the constitutional problem raised by the affirmative answer given by the Supreme Court of Florida to the question certified to it by the United States District Court of Appeals for the 5th Circuit in accordance with the directions of this court.

The thrust of the affirmative answers and in particular the answer to Question Number 1 given by the Supreme Court of Florida in *Sun Insurance Offices, Limited,* v. *Clay,* Fla., 133 So.2d 735, is to prohibit any court of the state of Florida from giving effect to any contractual stipulation or provision which fixed the time in which suit may be instituted under such contracts as a period of time less than that provided by the comprehensive Statute of the State of Florida, Section 95.11, Florida Statutes 1963, and more particularly in this case, Section 95.11(3) being the Statute of Limitations on written, unsealed instruments (Appendix A).

95.11(3) "WITHIN FIVE YEARS—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal."

Such was the Florida Court's general conclusion on the applicability of Section 95.03, Florida Statutes 1963 (See Constitutional Provisions and Statutes Involved). When that conclusion is applied to the facts of the case at bar, the Courts of Florida, or the Federal District Court sitting in Florida with jurisdiction derived from diversity of citizenship of the litigants, must invalidate that provision of the personal property, world-wide, all risks, floater insurance policy, issued by the Appellant to the Appellee in Illinois, which provided that any suit arising out of said policy must be filed within twelve (12) months from the discovery of the loss of the goods insured.

The determination by the Supreme Court of Florida (*Sun Insurance Offices, Limited*, v. *Clay*, Fla., 133 So.2d 735) fulfills the requirement previously set by the majority opinion of this honorable court when this case first appeared before it. (*Clay* v. *Sun Insurance Offices, Limited*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170), wherein the court declared

> "The constitutional issue should have been reached, only if after decision of two non-constitutional questions, decision was compelled."

Accordingly the two non-constitutional questions were decided and the compelling question, indeed the only question, remaining is whether there exists a violation of guarantees of the Federal Constitution resulting from the invaldation of the twelve months' "suit clause" in the subject insurance policy.

Statutes similar to Florida's Section 95.03, Fla. Stat., exist in thirty-one other jurisdictions. Carnahan, Conflict

of Laws and Life Insurance Contracts (1958), Secs. 26 (h), n. 83 and 137. Each in similar spirit, if not letter, expresses a legislative determination that the Courts of the jurisdiction, when called upon to adjudicate relative rights and liabilities arising under contracts, particularly of insurance, will not enforce contractual provisions which deprive the insured from a fair opportunity to seek the benefit of the insurance for which he has already paid. The specific constitutional issue raised in this appeal concerns only the applicability of Florida's statute to a foreign policy of insurance, but in a larger sense, magnified thirty-one times, the issue as decided will affect the legislative and judicial protection that any other jurisdiction of this nation may afford its citizens or good faith litigants who may find themselves in the Courts of those jurisdictions. It has been long recognized that the very nature of the insurance business demands that the insured receive the beneficent protection of the State. As earlier, succinctly stated by one of the sister circuits of this Court, "Legislation regulating insurance falls properly within the exercise of the State Police power." *New England Mutual Life Insurance Co.* v. *Olin*, 114 F.2d 131, at page 137.

In the case at bar, the contract was made and delivered in Illinois. Except for that fact and the additional information that the appellant has been licensed to do business in Illinois (among several other jurisdictions), there are no other effective contacts with the State of Illinois that appear in this case. Soon after the policy became effective, the insured-Appellee became a resident of Florida, moved himself, his family, his home, and indeed the insured property to Florida. The loss to the insured goods occurred while they were located in Florida, and the investigation of the loss was made by the Appellant through the use of Appellant's Florida agents. In addition, Florida contains

the lawsuit. Furthermore, the Appellant is licensed to do business in the State of Florida. The subject policy not only does not specify the law of the State of Illinois to be applicable or controlling, but is entirely silent on the subject, and by definition a "world-wide" policy contemplates performance of the contract anywhere.

In a line of cases beginning with *Home Insurance Company* v. *Dick et al.*, 281 U.S. 397, 50 S. Ct. 338 (1930); *Hartford Accident and Indemnity Co. et al.* v. *Delta and Pine Land Co.*, 292 U.S. 143, 54 S Ct. 634 (1934); *Pink* v. *A. A. A. Highway Express, Inc., et al.*, 314 U.S. 201, 62 S. Ct. 241 (1941), reh. den. 314 U.S. 716, 62 S. Ct. 477 (1942); and culminating with *Watson* v. *Employers Liability Assurance Corporation, Ltd.*, 348 U.S. 66, 75 S. Ct. 166 (1954), reh. den. 348 U.S. 921, 75 S. Ct. 289 (1955), the Courts have dealt, at first only obliquely, with the problem of what law controls when the law of the place where the contract was made conflicts with an honestly expressed and sincerely administered public policy contained in the laws of the forum. None of these cases are on all fours with the case at bar, and probably for that reason, each is important to the solution of this case. For each decision, up to the Watson case, which does deal directly with the exact point here presented, recognized that at some point the forum state, if closely enough associated to the lawsuit and the parties litigating, could subject a foreign contract to the law expressed in an overriding public policy of the forum state. In *Home Insurance Co.* v. *Dick et al.*, the Appellee, the insured, was a Texas resident bringing suit against an insurance company incorporated in Mexico. The only jurisdiction which the Appellee was able to obtain over the Mexican insurance company was in rem by publication and garnishment of the Mexican insurance company's New York reinsurer, which appears as the Ap-

pellant in the reported case. The suit involved an attempt to collect from the insurance company for damage done to plaintiff-Appellee's tug boat in Mexican waters. The policy of insurance was executed in Mexico and expressly restricted the coverage to damage occurring only in Mexican waters. The policy limited the time within which suit on it had to be instituted. A Texas statute declared such provisions contained in contracts void in Texas. An appeal from the Texas Supreme Court put in issue the constitutionality of the Texas statute as applied to a contract provision to the contrary, the contract having been made and performed outside of Texas, and with one of the contracting parties not actually a party to the litigation. The Supreme Court reversed the decision of the Texas Supreme Court and held that the statute as applied to the facts of the case, violated the Constitution, as a taking of private property, i. e., contractual rights and obligations, without due process of law. It is obvious from a mere abstracting of the relevant facts of the Dick case, that distinctions between it and the case at bar exist in almost every relevant detail. But it is for this reason that the case itself is important to the present controversy. Mr. Justice Brandeis, in delivering the opinion of the Court, took great care to point out that the decision reached in the Dick case would not always be the decision to be reached in subsequent cases where the relevant facts were not so clearly against the forum state.

> "A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws." At page 407.

In footnote 5 on page 408 of the report of the Dick case, the Court lists and compares cases that divide on the question of fact whether there were in those cases things done within the forum of which the forum could properly lay hold as the basis of imposing its own protectionist policies. Among these are personal jurisdiction over both the contracting parties, performance of the contract within the forum state, residence of the parties within the forum state, and other such illustrations of possible, commercial contacts with the forum state. In that footnote, the Court concludes its compendium of cases with this remark, "In the absence of any such things, as in this case, the Court was agreed that a state is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there." Again in the reported case, Justice Brandeis, on page 10 makes a similar reference to the distinction between contracts not made but which were to be performed in the state in which the lawsuit is litigated. The opinion concludes with the following dictum, most relevant to the case at bar:

> "We need not consider how far the state may go in imposing restrictions on the conduct of its own residents and of foreign corporations which have received permission to do business within its borders * * *." At page 410.

The Dick decision, therefore, sets forth at least three facts which in combination would permit a forum state to apply its own statutes invalidating stipulations appearing in contracts limiting the forum's Statute of Limitations—(1) that the contract is performed in the forum state, (2) that the contracting party is a resident of the forum state, and (3) that if a corporation be involved as a contracting party and is a foreign corporation, that it is one which has

received permission to do business within the borders of the forum state. Each of these in combination appear in the case at bar.

Some four years after the Dick decision, the Court decided the Delta & Pine Land Co. case, which throughout the instant litigation has been urged by the Appellant as controlling the facts of the case at bar. The facts of the Delta & Pine case, as the facts of the Dick case, are so dissimilar to the instant case as to render the decision useless as precedent; however, the Appellee feels the rationale is persuasive in distinguishing between situations where the forum is insufficiently connected with the contract and instances where the forum is justified in applying its own law. The Delta & Pine case was an action by an insured against a Connecticut fidelity insurer, instituted in the state courts of Mississippi. The defendant's plea, in addition to alleging the policy to have been made in Tennessee, set up as an affirmative defense a clause in it which required the insurer to make demand on the defendant within fifteen months of the termination of the suretyship. A statute of the forum state which declared void contractual attempts to limit to less than the state's requirements the time within which suits could be brought, was applied to nullify the contractual clause. The United States Supreme Court reversed the forum state, holding the application of the Mississippi statute to nullify the contractual provision was a deprivation of due process.

For present purposes, the Delta & Pine case is edifying not because its results are superficially contrary to those urged by the Appellee, but rather because of the differences inherent in the two contractual provisions sought to be nullified by the respective fori states.

In the Delta & Pine case, the contract provision did not operate to shorten the forum's statutory limitation

period (See Appendix B). The demand by insured on insurer within fifteen months of the termination of the suretyship was a true condition precedent necessary before the insurer was rendered contractually liable. Once the condition was complied with by the insured, the contract did not then attempt to speak further on the time within which suit by the insured had to be brought. Therefore, it was assumed by the Court that the condition precedent having been met by timely notice, the statute of limitations of the forum would be unaffected by the contract. In other words, as long as the contract did not attempt to superimpose its mandate on the legislative public policy of the forum, the forum could not constitutionally impose on the contract. The case at bar is decidedly different. The offending contractual provision relates directly to the time within which the Appellee must bring suit. Liability of the insurer is contractually extinguished by noncompliance, and within a period which conflicts with the legislative mandate of forum Florida. As in the Dick case, the Court in Delta & Pine concedes "That ordinarily, a State may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws * * *. Cases may occur in which enforcement of a contract as made outside a State may be so repugnant to its vital interests as to justify enforcement in a different manner." At page 150.

There exists in the case at bar all of the desiderata which the Supreme Court postulated in both the Dick and Delta & Pine cases. Of the two opposing litigants, the insured is a Florida resident, the insured is licensed to do business by the Secretary of State of Florida. The goods insured were at the time of the loss located in Florida and, therefore, the contract was to be performed in Florida. Florida is the forum state. In addition to these myriad,

controlling contacts, the contractual provision attacked by the application of Section 95.03, Fla. Stat., is one which seeks to violate a valid and proper policy determination of the Florida legislature.

> "Every state has authority under the Constitution to establish through both its judicial and its legislative arms, laws which are controlling upon its inhabitants and domestic affairs; when it is demanded in the domestic forum that the operation of these laws be supplanted by the statute of another state, that forum is not bound, apart from the full faith and credit clause, to yield to the demand, and the law of neither case, by its own force determine the choice of law for the other."
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> *Pink* v. *A. A. A. Highway Express, Inc. et al.*, 314 U.S. 201, 209, 62 S. Ct. 241, 246 (1941).

The application of the above rationale in the Pink case affirmed a Georgia court's refusal to apply New York law to contracts of insurance written in New York in an action by the insurance company brought against Georgia residents in Georgia. Such reasoning is equally applicable to the case at bar where no statute of a sister state, but rather a contractual provision between individuals violates the forum's laws. The Pink holding illustrates the desire of the courts of the various jurisdictions to be free of the hoary restrictions imposed by the ancient theory that a forum state must apply the law of the place where the contract was made. Such a theory applied between jurisdictions as politically and economically integrated as the Constitution requires that the various States be, could only result in inequity, confusion or equal parts of both. Was the forum to look to the substantive or conflict laws of the place of the making? If to the substantive, which procedural law was controlling? If to the conflicts law, what if that law required the application of the law of the

forum so that the result was a seemingly perpetual bouncing back and forth between the two? See Stumberg, Conflict of Laws, 11-12, 228. In contracts insuring persons or chattels completely mobile, in which the terms expressly contemplate coverage regardless of location, was the law of the place where the contract was made to apply indiscriminately? In days where insurance is solicited and purchased by mail, is the fortuitous postmark to be capable of overriding the public policy of a forum honestly attempting to afford its citizens equitable protection against more astute and powerful negotiators?

The ultimate disposition of these oft-posed questions was made by the United States Supreme Court in *Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, 75 S. Ct. 166 (1954), reh. den. 348 U.S. 921, 75 S. Ct. 289 (1955).

The Watson case, in contradistinction to the Dick, Delta & Pine and Pink cases, presents an underlying factual situation startlingly similar to that of the case at bar, and, more important, an identical constitutional issue. Plaintiff Watson brought suit against the defendant insurer in the Louisiana state court and was removed to the Federal District Court on the basis of diversity of citizenship. The injured Watson invoked a state statute permitting direct legal action against the insurance company prior to any separate determination of the liability of the insured. The application of the statute ran directly in the face of a contractual stipulation in the insurance contract between insured and insurer, which prohibited such direct action prior to a determination of liability. The contract thus put in issue was made in the state of Massachusetts and the insured was an Illinois corporation. The plaintiff's injury occurred in Louisiana. On appeal to the United States Supreme Court seeking to reverse the trial court's

judgment for the defendant, the issue presented was whether the Federal Constitution forbade Louisiana from applying its own law to a contract and compelled the forum to uphold the offending contractual provision by applying the law of Massachusetts (lex contractu) or Illinois (domicile).

The Court reversed the trial court, holding that neither due process nor the full faith and credit clause was violated by application of Louisiana law to invalidate a contractual provision which would have been upheld if Massachusetts had been the situs of the suit.

Justice Black speaking for the Court dealt with due process and full faith and credit respectively in terms which are controlling in the case at bar:

> "As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this court has in a series of cases held that more states than one may seize hold of local activities which are part of multi-state transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states." At page 72.
>
> "That clause (Full Faith and Credit) does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to be formerly executed. Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies." At page 73.

Specific holdings notwithstanding, the appellee has attempted to illustrate that all the cases relevant to the issue presented herein have agreed that a forum state shall not, if sufficient contacts with the case, and determined poli-

cies to protect exist, be forced to overlook those contacts by subordinating its policies to the conflicting laws of a foreign jurisdiction similarly interested in the contract, policy or other res being litigated. Constitutional mandates are not violated if the contacts are adequate.

In the case at bar, the interests of the State of Florida are superior to the interests of any other state because Florida was the place of performance of the contract; it was the place in which the cause of action arose; it was the state of the policyholder's domicile; the insurance company was subject to the regulation of its business by Florida, and finally because contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

> "Insurance companies, like other contractors, do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in states far away from the place where the contract is made. In this very case, the policy was sold to Clay with knowledge that he could take his property anywhere in the world as he saw fit, without losing the protection of his insurance. In fact, his contract was described on its face as a 'Personal Property Floater Policy (world-wide).' The contract did not even attempt to provide that the law of Illinois would govern when suits were filed anywhere else in the country. Shortly after the contract was made, Clay moved to Florida and there he lived for several years. His insured property was there all that time. The company knew this fact. Particularly since the company was licensed to do business in Florida, it must have known it might be sued there, and that Florida courts would feel bound by Florida law." *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170 (1961) (Mr. Justice Black in the dissenting opinion concurred in by the Chief Justice and Justice Douglas).

While the appellee has attempted to deal simultaneously with both constitutional provisions, due process and full faith and credit, as the cases themselves do, it seems relevant here to express the appellee's theory that the latter clause is not invoked by the facts of the case at bar. That clause commands full faith and credit be given only to the "public acts, records, and judicial proceeds" of the foreign state by the forum. The issue would arise in this case only if it had been first determined that the forum could not apply its own statute to the contract because a violation of due process protection would result. In that event, Florida would have to decide the case solely according to the law of Illinois, meaning that a refusal to apply the Illinois law which permits contractual shortenings of limitation periods would result in a failure to pay adequate homage to Illinois' case law. The statement of the circular proposition serves to illustrate the procession of horrors which can be marshalled by strict adherence to the theory that no other law is possible in commercial cases than that of the place where a contract has been made.

In its opinion of June 19, 1963, the United States Court of Appeals for the 5th Circuit (R. 56-66), called attention to the case of *Confederation Life Association* v. *Ugalde*, Fla., 151 So.2d 315, 318. However, in using the Ugalde case as criteria in the case at bar the court again completely ignored the entirely different circumstances prevailing in the two cases. In the Ugalde case the petitioner was not a Florida resident, the policy had been issued in Cuba to a Cuban resident by a Canadian company and if any loss occurred, it occurred in Cuba. Apparently the only excuse for bringing the suit in the Florida court was to attempt to force the payment of the loss in American currency rather than Cuban currency. The court also fails

to differentiate between a life insurance policy issued in Illinois and the case at bar. *Mutual Life Insurance Company of New York* v. *Hess*, 5th Cir. 1947, 161 F.2d 1; *In re-Mutual Life Insurance Company of New York*, 5th Cir. 1951, 188 F.2d 424. The Court of Appeals has in every instance completely disregarded the fact that in the case at bar the parties resided in the State of Florida during practically all of the life of the policy, the property covered by the policy was located in the State of Florida, the parties were citizens of the State of Florida, the loss occurred in the State of Florida, the investigation by the insurance company was made in the State of Florida and the litigation took place in the State of Florida and subject to the laws of the State of Florida. In no other case cited, with the possible exception of the Watson case, is there any similarity whatever between the cases relied upon by the Court of Appeals for the 5th Circuit and the case at bar.

In dealing with the action of the Florida Supreme Court in reference to the referred questions the court seems to take the position that the rules of the Florida Supreme Court were not followed and that in any event if the case had been commenced in the Florida courts the Florida Supreme Court would have had no jurisdiction since according to the United States Court of Appeals the Florida Supreme Court has jurisdiction only in issuance of extraordinary writs. The court fails entirely to take into consideration that the Florida Supreme Court in the Clay case when the questions were referred, required briefs by all parties concerned and in fact changed the court rules so that the Supreme Court could comply with the request of this honorable court. When the questions were propounded in the Clay case the Florida Supreme Court even went to the extreme of requiring briefs on the constitutionality of Section 25.031, Florida Statutes 1961

(1957 and 1959). Rather than accept the decision of the Florida Supreme Court the Court of Appeals seems to take the position that the Florida Supreme Court should have followed the reasoning of the United States Court of Appeals. Furthermore, the Court of Appeals completely disregarded the decision of the Florida District Court of Appeals in following the Florida Supreme Court in the case of *Frederick Schluter, Sr., Appellant,* v. *National Union Fire Insurance Company of Pittsburgh, Pa.*, Florida, 144 So.2d 95. If the Florida Supreme Court had no jurisdiction as implied by the Court of Appeals then its opinion would not have been binding upon nor would have influenced the Florida District Court of Appeals.

The decision of the Florida Supreme Court in the Clay case in answering both questions propounded in the affirmative definitely accepts the responsibility of the State of Florida to enforce its laws for the protection of its residents and their property regardless of the duration of the residency. In cases where Section 95.03, Florida Statutes, has not been applied to contracts performed within the State of Florida there has been either a preemption of the field by the federal law or the contract involved a subject matter peculiarly affected by maritime interests. *Scheibel* v. *Agwilines, Inc.*, C.C.A. (2 Cir. 1946) 156 F.2d 636; *J. B. Effenson Co.* v. *Three Bays Corporation, Ltd.*, C.A. (5 Cir. 1956) 238 F.2d 611, but see *Hoagland* v. *Railway Express Agency*, 75 So.2d 822 (1954).

In neither opinion of the United States Court of Appeals has the court referred to a single case with the possible exception of the Watson case, where a state had the interest that the State of Florida has in the case at bar, and therefore, the right to expect that its laws and the public policy stated in the laws of Florida, will be enforced.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the validity of Section 95.03, Florida Statutes 1963, should be upheld and its application to the circumstances of this case by the United States District Court be confirmed; that the findings of the United States Court of Appeals for the 5th Circuit should be reversed and the case remanded with instructions that the judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned of counsel for Petitioner certifies that a true and correct copy of the foregoing Brief of Petitioner After Granting of Writ of Certorari has been served on BERT COTTON, Esq., Attorney for Respondent, 56 Pine Street, New York, N. Y. 10005, by mailing by United States postage prepaid, this 21 day of Jan, 1964.

APPENDIX A

Excerpts from Florida Statutes 1963:

"Section 95.11 Limitations upon actions other than real actions.—Actions other than those for the recovery of real property can only be commenced as follows:

(3) "WITHIN FIVE YEARS—an action upon any contract, obligation or liability founded upon an instrument of writing not under seal."

APPENDIX B

Contract stipulation from Hartford Accident and Indemnity Co. v. Delta Pine Land Company (150 So. 206):

"Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."